VIRGINIA LAW REGISTER

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The Albemarle Bar, XVI.

The mere mention of the name of Mason Gordon to those who knew him, brings memories of the tenderest, sweetest kind—memories in which smiles and tears mingle. He was a most lovable character; unselfish, without a single trace of malice or illwill to any human being; open and aboveboard, courageous, gentle, working hard all his life but getting as much pleasure out of life as any man could. "When Mason Gordon died," a member of the Charlottesville Bar said at his funeral, "the last old fashioned Virginia gentlemen left us." To a certain extent it was true. He had all of the virtues and some of the foibles of that character men are pleased to call the old Virginia gentleman.

Courteous to women, speaking not slander, nay, nor listening to it; brave without bravado. Steeped in Walter Scott and Bobbie Burns and Byron, with a wonderfully retentive memory and ready to quote you upon any given subject, he walked this world esteemed and beloved, a pure, honorable man. The youngest son of the distinguished General William F. Gordon, he was born at Edgeworth, the seat of his father in Albemarle County, September 17th, 1840. His mother was Elizabeth Lindsay, a lady of the highest intellect and culture, who lived more than ninety years, dying at the home of this son, who was, as his father predicted, the staff and support of her old age; for when Mason was born, his mother was well advanced in years and his birth was somewhat of a surprise. She made some laughing remark as to his coming and his father replied, "Never mind, my dear; that boy will be the staff and support of your old age" And he was. A devoted son, he was no less a devoted husband and father. Educated at private schools and then entering the University of Virginia in 1859-60, he left its classic walls and enlisted in the Albe-

marle Light Horse. He was a fine swordsman and was soon selected by General Robinson as drill master and commissioned a second lieutenant and ordered to North Carolina, in which state he met the lady who was to be his wife.

After the close of the war he returned to the University and studied law under John B. Minor. He commenced practice in 1866 in Charlottesville, with William L. Cochran, which partnership continued until Mr. Cochran's death in 1875. He was then appointed Commissioner of Accounts and Commissioner in Chancery and in the course of a year or so devoted himself almost entirely to the work of those offices and practiced very little upon the law side of the courts, but doing an excellent chancery practice. He was a most faithful and efficient officer and hard working and conscientious attorney. He served one term as a member of the Board of Visitors of the University of Virginia. His home "Stony Field," very near the University was noted for its charming hospitality—that true genuine hospitality without pretense or sham, but where the hearts were great, even though the hoard may have been frugal. Here came nephews and their friends, nieces and their friends and friends friends, to receive from this dear old man and his lovely helpmeet the warmest of welcomes with the old time charm of the old time Virginia household.

Mason Gordon died June 9th, 1914, his wife having predeceased him. He had one son—William Robertson Gordon, who died before his father—and two daughters, Harriet, who married Thomas L. Rosser, Jr., and Nancy Burr Gordon.

George Perkins was born in the County of Cumberland on the 7th day of December, 1847. He attended private schools until 1864, when he entered the service of the Confederate States, serving first in the Reserves and then as a member of the Cumberland troop of cavalry of which his father had been Captain. He served until the end of the war and entered the University of Virginia in the session of 1865-6, graduating in the Law School under John B. Minor in 1868.

After graduation he married a daughter of Judge Egbert R. Watson one of the most prominent lawyers of Charlottesville, and entered into partnership with him—a partnership which commanded a large practice and was terminated by Judge Watson's

death. Later on Mr. Perkins formed a partnership with his son, William Allan Perkins, later taking Mr. George E. Walker into the firm. Mr. Perkins died in 1918, May 22nd.

He was a man of the loftiest ideals, of great energy, a lawyer of ability, a fine speaker and had a large and lucrative practice. He was an elder in the Charlottesville Presbyterian Church and an active worker in the church and Sunday School. He was survived by his son, William Allan Perkins, and two daughters, Mrs. George R. B. Michie of Charlottesville, and Mrs. Lowndes Maury of Butte, Montana.

John Barclay Moon was born in Albemarle County, Virginia, on July 20th, 1849. His father was Robert Barclay Moon, a civil engineer and farmer, and his mother was Mary Massie, both of Albemarle County and both of distinguished Virginia families. Mr. Moon's youth was spent in the County and upon his father's farm he learned how to work and always said that his physical health and development were due to the years thus spent upon the farm. After attending preparatory schools he went to the residence of a relative in Lexington and from 1863 to 1868 was a student at Washington College, now Washington and Lee University. After leaving college he worked and studied for two years in a lawyer's office and commenced the practice of law in Albemarle County in 1871. He soon occupied a high position at the bar. He was not only an excellent lawyer in every respect but was most widely known and prominent in the public life of Virginia. He represented Albemarle County in the Virginia House of Delegates for three terms, being Chairman of the Finance Committee and the Railroads Committee of the House. He was Commissioner for Virginia to settle the direct tax that the United States Government refunded to Virginia in 1892-93, and from 1895 to the time of his death was Chairman of the Commission for the settlement with the State of West Virginia, of the debt of the original State of Virginia.

Mr. Moon was elected Attorney for the Commonwealth for Albemarle County in 1912, but resigned after a very short service. He was Chairman of the Board of Supervisors of Albemarle County for some ten or twelve years. Mr. Moon was probably one of the best legal draftsmen in the State of Virginia. His papers were clear, concise and put the salient points of a case in

such shape that very little trouble was needed to understand every point raised. He had a mind peculiarly accurate, strong and able and was probably one of the most influential men in the State. He won the confidence of those who knew him and knew how to persuade men to take his advice on most subjects which he proposed to discuss.

No man was ever a more true and loyal friend than Mr. Moon. He never hesitated to go to any extent consistent with high motives for the aid of a friend and the qualities of both his head and heart were of the highest order. He married Miss Marion Gordon Dabney of "Dunlora" and seven children survive him: One son, Captain Basil Moon of New York City, Mrs. Maury, Miss Mary Moon, Esther, who intermarried with George Fishburne, Agnes, who intermarried with Bryan Shaw, Anne, who married Philip Peyton, and Dabney Moon. He died at "Dunlora" February 20th, 1915.

Mr. Moon filled one of the highest places in the State in the estimation of his fellow men and his friends yet retain the warmest memories of the man.

A. A. Gray, was born on the 22nd day of May, 1835, in Fluvanna County. His father was an eminent physician and his mother of one of the prominent families of the State. Mr. Gray was educated at the University of Virginia where, after spending several sessions in the Academic department, he graduated in law in 1857. He commenced the practice of law in the County of Fluvanna, which county for several years he represented in the Virginia Legislature, and was for a series of years Commonwealth's Attorney for that County. Only ill health prevented him from entering the Confederate Army, but he did all that he could in a private capacity to aid the cause.

He moved to the City of Charlottesville soon after the Civil War and entered into partnership with Clement D. Fishburne, Esq. The partnership was quite successful, but a desire to return to his native county was so strong that after a few years of practice Mr. Gray returned to Fluvanna, where he resided and practiced with great success until his death on the 19th of November, 1908. He was a lawyer of energy and distinction, able and thorough and a most eloquent and logical speaker. Whilst always assertive and strong he was eminently fair and courteous

and practiced his profession on a most elevated plain. A man of exceedingly handsome presence, of gracious and genial manners and with a rare command of his native tongue, only his modesty prevented him from occupying a high position in the councils of the Nation. He was a christian gentleman and whilst he was one of the Vice-Presidents of the State Bar Association it was on his motion that the rule was adopted for the opening of the meetings of that association with prayer. He died Nov. 12th, 1908.

Mr. Gray was twice married: His first wife, Miss Shepherd, of Fluvanna, by whom he had one daughter who married Frank T. Shepherd, of Houston, Texas. His second wife—who was Miss Bettie Ann Leftwich, of Bedford County, survives him with two children, Dr. Alfred L. Gray, a prominent surgeon and X-ray specialist of Richmond, Virginia, and E. A. Gray, an Attorney of Houston, Texas.

Everett W. Early was born in Albemarle County on the 29th of February, 1844. He was the son of Captain W. T. Early and Lizzie Michie, a sister of Captain H. Clay Michie. Upon the secession of Virginia he went to the Virginia Military Institute to fit himself for service, and in June, 1861, he was ordered to Manassas to drill the raw troops there assembled. He was assigned to the 49th Virginia Infantry and made Sergeant Major of the regiment, and as such served in the first Battle of Manassas, where he was wounded. He was promoted to a lieutenancy and served under Jackson and Early. He was badly wounded at Chancellorsville and whilst recovering from his wound attended lectures at the University of Virginia. When he recovered he returned to his command and was in several other engagements. He was at home on furlough in March, 1865, and was captured by Sheridan but escaped. He re-entered the University and then went to Heidelberg University and studied awhile in Paris. He returned and offered for practice in Albemarle in 1869. Receiving a position in the Bankrupt Court he moved to Lynchburg.

Returning to Charlottesville he was elected to the Virginia Senate as a debt-payer and served one term. He did not attempt to resume practice, being a man of some means and unmarried. He died whilst on a visit to New York in 1896.

Lieutenant Early was a man of brilliant intellect. An only

child, he never felt the necessity of exertion and so did not occupy the position to which his talents entitled him. He was a gallant soldier and of the highest courage.

College Education as a Pre-Requisite to the Practice of the Law.

We are very loath to differ with the able and learned Dean of the Law School of the University and the committee of the American Bar Association. But in our humble judgment the recommendation of the National Conference of Bar Associations that a two years college education be made a pre-requisite in addition to the regular law school work, for qualification at the bar is all wrong. Chief Justice Taft may be right in saying "The country already has too many lawyers." The two years college course will not prevent this. On the contrary we believe it will open the door to one class of men and shut it to another equally as worthy. Education at a college does not necessarily fit a man for the practice of the law. The fact is—and we say it with bated breath—we are attaching entirely too much importance to college education. We are becoming decidedly "Chinesy" in our anxiety for examinations for this and that position. The standard of admissions to the bar has been steadily raised year after year. A three year course is now absolutely necessary in most of the law schools for the degree of B.L. or L.L. B. We ask in all seriousness, are the present lawyers equally high in the standard of ethics as they were twenty-five years ago? Is not law becoming more and more a trade instead of a learned and high and dignified profession? Are not some of the best educated lawyers—men with B.A. and M.A. tacked to their names, most unworthy members of the great profession? If you doubt it read the great metropolitan journals and see the things done by lawyers who are graduates of the best colleges and universities in the country. Some of the very best lawyers we have ever known never had a college education. Senator Thomas S. Martin, one of the ablest, most honorable and successful lawyers we ever knew, never attended a law school. Shelton F. Leake, and V. W. Southall were great and high lawyers. Neither of them ever attended college or a law school. We

could name many of the ablest lawyers in Virginia who never attended a college: Clay, Lincoln, Trumbull, Edmunds, Thurman, Assocate Justice McLean of the Supreme Court of the United States, Charles O'Connor—none of these great lawyers ever attended college. Why debar the poorer young men from an honorable career? Many men of the highest ability and noblest type of character have not the means of attending college. Think what would be the effect of such a rule upon the young men who came out of the Civil War and taught school or labored with their hands to raise enough money to attend a law school. You debar undoubted talent and integrity and admit men unworthy to tie the shoe laces of these non-graduates. The fact is we are putting too much stress upon education and too little upon character as a prerequisite to admission to the bar. If the committees and law teachers would only devise some means of raising the standard of character of those who apply for practice they would accomplish much more than in trying to make an educational qualification. There are too many "shysters", we might tell Chief Justice Taft, as well as too many lawyers; too many men who look only at the fees and who having brains to sell, sell them as a peddler does a yard of calico or string of beads, regardless of anything else. Encouragers of litigation; stirrers up of strife; active in the divorce courts; ambulance chasers. All the college education in the world will not keep these men out of the ranks of the profession. Let our bar associations work at some method to keep such men from practicing law, rather than say to the energetic, earnest, hard-working young man who has neither time nor means to get a college education, "Get you two years at college or stay out."

The Coddling of Criminals.

"Hold Three in Wild Shooting"; "Wild Pistol Shots Land Three in Cells" (separate cases); "Butcher Routs a Robber"; "Stabbed by Father"; "Day Family Calls Verdict Just"; "Son Finds Mother Beaten; Kills Friend"; "Wife Kills Husband in Restaurant"; "Mrs. Shattuck Ill from Robbery Shock"; "Slays Three Children, then Kills Himself", "Hold Woman with Gun"; "Kills His Accomplice

When Jail Break Fails"; "Slay Saloon Card Player"; "Robbers Invade Club"; "Policeman Felled by Ten Gangsters"; "Boy Seizes Bicycle; Another Shoots Lad."

All of the foregoing are head lines on *one page* of the paper which professes to give "all the news that's fit to print" of Monday, April 10th, 1922. And these are but a few of the items of a similar character which are upon other pages of the same paper.

What is the matter with this country? And a strange and horrible thing is to notice now many crimes are committed daily by paroled prisoners. Equally distressing is the fact that the vast majority of the most serious crimes are committed by men and women with foreign names—"Skis" and "Insteys" and "Steins" and "Bergs" and "Lippos" and "Lippinis". About one in ten has an English, Scotch, or Irish name.

The following, from the *New York Times* of a few days ago is one of the few exceptions, and here it is even:

"John McGrath, 30 years old, of 441 East Ninety-first Street; arrested for burglary in 1915 and released on suspended sentence; arrested in 1916 for illegally possessing drugs and received a suspended sentence; arrested again in 1916 for burglary and sent to Elmira; convicted in 1920 of dealing illegally in drugs and sent to the Workhouse.

"Charles Gallagher, 23 years old, of 203 East Seventy-fourth Street; sent to Elmira for burglary in 1915; sent to the Workhouse for disorderly conduct in 1916 and later in the same year to Elmira for burglary; sent to the Penitentiary for eight months in 1918 for grand larceny.

"Christopher Pepler, 28 years old, 354 East Ninety-first Street; sentenced to Elmira for burglary in 1913; arrested in 1920 for grand larceny and was out on bail in connection with that two-year-old crime.

"John Metz, 30 years old, 229 East Eighty-eighth Street, arrested twice for disorderly conduct; no convictions, as far as the records show.

"The prisoners made confessions implicating a fifth man who was familiar with the business of the Masten Construction Company and who gave them the particulars of payroll handling by that firm which enabled them to prepare for the crime.

"Gallagher and Metz confessed they had stolen the automobile on Thursday night at Fifty-fifth Street and Seventh Avenue.

The car belonged to Michael J. Dunne, 2,422 Webster Avenue, the Bronx."

It will be noted that out of these four one was on bail, one on suspended sentence and one had been arrested twice for disorderly conduct; and if one carefully reads the "hold ups", murders and other crimes committed in New York he will find the vast majority of them are by men with previous criminal records, and many of them by men with suspended sentences or out on bail.

This is the era of new theories as to dealing with criminals. The main idea seems to be to reform the criminal, not punish the crime or by punishing deter others from criminal acts. We are coddling criminals; we are forgetting that society needs protection as much, if not more than the criminal needs reform. We are so sorry for the poor fellow who has committed murder or arson or burglary that we forget to be sorry for ourselves. Crimes of the most serious nature are increasing by leaps and bounds. We call particular attention to the following statement of the Chief of Police of Chicago, in an address made to the Chicago Association of Commerce on March 22nd, of this year. He said that "murderers under sentence are walking the streets." Criminals of all classes walk the streets with immunity and "they fear only the policeman whose sense of indignation occasionally overcomes his sense of discretion, and then—well, then we have just one less crook to deal with forever more."

Robert E. Crowe, State's Attorney, asked the Cook County Council lately for $100,000 for a campaign to put down crime.

What interested the business men most in Chief Fitzmorris's speech was his lifting the curtain to show what happens after a criminal is arrested and taken to the police station.

"I can tell you that best," he said, "by citing examples. We got word a year ago that a building in the south side was to be bombed on a certain night. Policemen were sent out to the watch for the bombers. At midnight the bomb was placed in a doorway in which a policeman was stationed.

"These bombers were arrested. One of them—a man named Smith—thought he could do himself some good by making a clean breast of matters. He confessed. Later in the county jail, he was so beaten and harrassed by that crowd of bombers that he went stark crazy. We have never been able to try that case."

He told of the case of four men arrested in a North State

Street murder and of a Judge who ordered them peremptorily released.

"Despite the fact," continued the Chief, "that we tried to show him a signed confession to murder by one of the four. The officer followed him into his chambers in an effort to show him the confession. He would not look at it."

Governor Cox of Massachusetts utters a note of warning worthy of careful consideration in a statement declaring that too many prisonere were placed on probation.

"In the year ended Sept. 30, 1921," the statement said, "the criminal courts of Massachusetts disposed of 97,122 cases of persons after conviction. Of these 23,845 were placed in the care of probation officers. In my judgment, this is too large a number. Figures for the year ended Sept. 30 are startling, in that they show that on the basis of 1,000 convicted persons only 93 were placed in restraint, while 907 were released on fines.

"Leniency may have been justified, but apparently the result of leniency is becoming a strong factor in making crime increasingly prevalent. If men desire to walk the streets as free men, let them obey the laws; if they prefer to break the law under the belief that the only punishment to be met with is the amount of money they pay for the privilege, the time has come for a change in the form of punishment, with jail sentences a substitute for the present existing methods.

"Putting men in prison may sound a bit old-fashioned, but the fear of a prison term has long been a mighty deterrent to criminals. Is it too much to expect that small doses of jail or prison may be made an effective substitute for the system of fines and filing now in force?"

The Governor also called upon "decent citizens" to aid in giving evidence against bootleggers "who are selling abominable stuff that drives men crazy if it does not kill them."

Our own State has not been free of this.

An examination of the legislation of the last decade or so will show that our legislators have thought more of the protection of the criminal than of the necessity of deterring crime. The very unfortunate act compelling the Supreme Court of Appeals to grant a writ of error in every criminal case has been repealed by

the last Legislature, but there remains on the Statute Book an act almost as unfortunate: That is the Act of March 10th, 1920, Acts 1920, p. 24, amending Section 4930 of the Code of 1919. As that section stood when it came from the hands of the Revisors it provided that "for *misdemeanor* after conviction and sentence * * * the court or judge thereof in vacation may in the discretion of such court or judge let the prisoner in bail in such penalty and for appearance at such time as the nature of the case may require." Under the terms of the amended act bail may be allowed in the discretion of the court or judge in *any case* after conviction and sentence. The result of this is that a cold blooded murderer, rapist or burglar may be duly convicted and sentenced and then appeal and be bailed and be seen walking the streets ostensibly a free man for months before his appeal is decided. The effect of this upon the community necessarily must be bad. Our criminal laws are mocked at and disregarded now in too many instances. What can have a worse effect than to see a convicted criminal a free man to all intents and purposes?

It is said that bail lies in the discretion of the court or judge. This is true, but too often courts and judges are disposed to be lenient and yield to arguments appealing to mercy, rather than the strictness of enforcement which alone can ensure the punishment of vice and crime. We know of a case in point in which, however, fortunately the judge did not yield to the earnest and forceful argument of counsel. A man was convicted of a most outrageous attempt to ravish a young woman—a near neighbor. He took an appeal which automatically suspended sentence, and owing to the time of the terms of our Supreme Court his appeal could not be heard for nearly eleven months. Had he been bailed he would have walked the streets of the city a convicted felon, going every morning by the door of the girl whose ruin he had attempted and in plain sight of innumerable people, who knew of his crime and conviction. We do not know of a case which would have more thoroughly invited lynch law than this and which would have had a worse effect upon the more ignorant and vicious classes of the population.

One consolation we can have in this State to offset the evil as to which we alluded in our article above, is the tendency of our

Proof of Venue: Illegal Evidence: Harmless Error.

Supreme Court to disregard technicalities which forty years ago would have reversed many criminal cases, and which never ought to have done so. It took our lawyers and judges a long time to get away from the old idea that the criminal stood at the bar a poor, helpless, dumb creature, without counsel and had arrayed against him all the power of the State; and though his disability to testify had been removed, his ability to have counsel allowed, and many other of the hardships of the Common Law removed, yet the safeguards necessitated by this state of affairs remained in full force.

The books were full of cases where by some slip of the prosecution the exact venue was not proven although it was fully set out in the indictment and the number and name of the street proven, and every man in the court house, including the prisoner and his counsel, knew where the street was located in which the crime was committed, the failure to prove that Gamble's Hill was in Richmond, or something of that sort, necessitated a new trial. In *West* v. *Commonwealth,* 125 Va. 747, and in *Harding* v. *Commonwealth,* decided Jan. 19th, 1922, our Supreme Court has practically settled this technicality so that it must be a very flagrant case of omission as to the venue which will justify a court in setting a verdict aside.

So as to the admission of testimony. Our old courts used to hold that any illegal testimony admitted against the protest of the accused compelled a new trial. The more recent and wiser rule is that the mere admission of testimony clearly illegal will not justify a reversal unless such testimony appears to have been capable of prejudicing the losing party *Atkins* v. *Commonwealth,* decided January 19th, 1922, following *Oliver* v. *Commonwealth,* 77 Va. 590, Jessie *v.* Commonwealth, 112 Va. 887, and other cases.

In *Jarrell* v. *Commonwealth,* decided Jan. 19th, 1922, this same doctrine is reiterated and is also made to apply to an erroneous instruction, which, however, the court held could not have influenced the jury in anyway.

Judge Burks dissented in this latter case on the ground that in his opinion both the evidence admitted and the instructions given were not harmless.

The case of *Jarrell* v. *Commonwealth* last alluded to is interesting as it presents a question entirely novel in this State. An instruction was asked in the following language: "The Court instructs the jury that if they elieve that Harry Jarrell and J. P. Thomas, or either of them, have knowingly testified untruthfully on any material matter in this case, they are at liberty to disregard the whole of their testimony." This instruction was refused by the lower court and in sustaining it in that refusal our Supreme Court says:

Encroaching Upon the Province of the Jury: Credibility of Witnesses: Instructions.

"It has been held that such an instruction should be given (State *v.* Perry (W. Va.), 24 S. E. 364); but it is also held that whether it should be given or not, in a particular case, rests largely in the discretion of the trial judge, and, in the absence of a statute authorizing it, should never be given unless the trial judge suspects that wilful false swearing has been done in the case. 14 R. C. L., sec. 11, pp. 736-7, citing *State* v. *Hickman,* 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54, and Schmidt *v.* St. Louis R. Co., 149 Mo. 269, 50 S. W. 921, 73 Am. St. Rep. 380. As said in *State* v. *Hickman,* such an instruction 'should not be given as a matter of course * * * and the propriety of giving it in any particular case must be left largely to the judgment and discretion of the trial court.' As said in *Schmidt* v. *St. Louis R. Co.,* supra, in regard to such an instruction 'The furthest the court can go in that direction without trenching on the province of the jury is to instruct them in effect that if they believe from the evidence that any witness has wilfully sworn falsely as to any material fact in the case, they may, if they see fit, for that reason disregard the whole of that witnesses's testimony. But in the giving of that instruction the court should act with caution. It is not to be given in every case and should never be given unless the trial judge strongly suspects that wilful false swearing has been done in the case.

"Our own views upon the subject under consideration are as follows: The credibility of witnesses is so peculiarly and exclusively within the province of the jury that we think it would be improper for the court to give such an instruction as that under consideration, which was refused in the case before us, because of its singling out by name certain witnesses. We think that naming of any particular witness or witnesses in such an instruction would tend to lodge upon the minds of the jury the impression that the trial judge is

not satisfied as to the truth of the testimony of the witness or witnesses mentioned; which would certainly be an improper invasion of the province of the jury. If indeed it is an admitted or uncontroverted fact, or there is clear and convincing evidence in the case that a witness or witnesses therein has or have wilfully, or, which is the same thing, knowingly testified untruthfully on any material matter, such an instruction as that under consideration may, in the discretion of the trial court, be properly given, if couched in general terms, to the effect that if the jury believe from the evidence that any witness or witnesses in the case have so testified, they are at liberty to disregard the whole of their testimony. But the trial judge should, as to such an instruction, in every case, act with caution; he should never give such an instruction unless from all the evidence he believes that wilful false swearing has been done; and even then he should refuse to give such an instruction if he feels that the jury would be warranted by the evidence in coming to a different conclusion as to such testimony.

"These being our views, it follows that there was no error in the refusal of the instruction in question."

ERRATA.

In our sketch of Hon. Shelton F. Leake in our December Number (Vol. 7, N. S., p. 607) we gave the name of his wife as Rebecca Barbour. It should have been Rebecca Barbour Gray.

The newspapers are responsible for our giving Hon. Jesse Felix West's middle name as Jesse *L.* in our February Number. We are glad to make the correction and hope the Judge may always be as happy as his middle name indicates.

The cases appearing on pages 836 to 843 in the March Number (Vol. 7, N. S.) are erroneously cited as 109 Va. when 109 S. E. was meant.